Filed 3/19/13 In re J.C. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re J.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	A135730 (Solano County Super. Ct. No. J41133)

I.

INTRODUCTION

Appellant J.C., a minor, appeals from a dispositional order entered after he was found to come within the provisions of Welfare and Institutions Code section 602. Appellant's sole claim on appeal is that the condition of probation requiring him to write a letter of apology to the victim violated his state and federal constitutional rights against self-incrimination. (U.S. Const., 5th Amend.; see also Cal. Const., art. I, § 15.) We disagree, and affirm the judgment.

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

On October 17, 2011, a petition seeking to have appellant declared a ward of the court was filed by the Solano County District Attorney's Office. (Welf. & Inst. Code, § 602, subd. (a).) The petition alleged that on August 16, 2011, appellant committed

felony grand theft, in violation of Penal Code section 487, subdivision (a), when he took "numerous items of jewelry" from the victim with a value exceeding $400. Appellant denied the truth of the allegations contained in the petition.

A contested jurisdictional hearing was held on March 28, 2012. At the hearing the victim testified that she is a teacher with the Vallejo Unified School District in a high school where appellant was one of her students. Appellant helped the victim move her classroom from one high school to another high school in the district during the summer of 2011. After that, the victim hired appellant to help her do odd jobs around her home during the various school holidays.

One day in August 2011, appellant came to the victim's classroom to help her get ready to start the school year. When he arrived, she noticed that he was wearing a jewelry pendant that belonged to her. It was on a chain that appellant was wearing around his neck on the outside of his clothing. The last time she had seen this piece of jewelry had been some months earlier when she placed it in her hidden jewelry box at home so it would not be found by painters who were in her residence. She recognized the pendant as being hers because it was custom made, and testified it was worth between $3,000 to $4,000.

Not necessarily in chronological order, appellant stated variously to the victim that he could not remember where he had gotten the pendant, that he got it from a friend, and that he had found it in the victim's home while he was vacuuming her living room, put it in his pocket, and had intended to return it to her but forgot. The last time appellant had been in the victim's home before August 2011 was days or weeks earlier, but the victim could not recall appellant doing any vacuuming there except during the spring break that year. "With a little prodding," appellant returned the pendant to the victim and stayed at school the entire day continuing to help the victim in her classroom.

The matter was investigated by the Vallejo Police Department. Officer Stephen Fowler of that department interviewed appellant about the pendant at appellant's home on August 18, 2011. Appellant told the officer that he found the pendant behind the victim's couch while he was vacuuming. He put the pendant in his shorts pocket, and found it in

the pocket about two weeks later when he next put the shorts on. The officer also interviewed the victim, who told him that she "had misplaced some items of jewelry" for a period of time and did not think anything about it until the previous week.

Appellant testified at the hearing that it was during spring break that he moved the victim's couch while he was cleaning her home and found the pendant there. He picked it up, put it in his pocket, and continued working. When he next saw the victim after he finished vacuuming, she told him immediately to start another project, and he forgot all about the pendant. It was some time later that he next put the shorts on and found the pendant still in his pocket. He knew he would be seeing the victim in a day or two, and it was his intention then to tell her the pendant was hers and to give it back to her. Appellant put the pendant on a chain around his neck because he was afraid he might lose it. Before he could give it back to the victim, she saw it around his neck. He told her he had found it while he was vacuuming her home. He intended to give it back to her but he forgot all about it.

At the conclusion of appellant's testimony, and after hearing argument, the court found appellant's explanation not to be credible, that the property had a value of more than $900, and that the other elements of grand theft had been proved beyond a reasonable doubt.

The case was referred to the probation department for an evaluation in connection with the dispositional hearing set for May 9, 2012. The probation officer who submitted the report to the court interviewed appellant, who adamantly continued to deny that he had any intention of stealing the pendant from the victim. Instead, he reiterated the version of events he testified to at the jurisdictional hearing; he simply forgot about the pendant in his shorts pocket during the several months which transpired from the time he found it behind the couch and the time he wore it to school on a chain.

The victim made a statement at the beginning of the May 9 dispositional hearing. After hearing from the victim and the arguments of counsel,[1] the court adjudged appellant to be a ward of the court and remanded him into the custody of his parents. Three years formal probation was granted, with conditions, including as material here, that appellant "[w]rite a letter of apology of at least fifty words to each victim." The letter was to be submitted to appellant's probation officer within 30 days of the hearing.[2] No objection was made by appellant's counsel to the imposition of this probation condition.

III.

LEGAL DISCUSSION

A. The Failure to Object Below Does Not Act as a Forfeiture

As noted in the Introduction, appellant's sole contention on appeal is that the condition of probation requiring him to write a letter of apology to the victim compelled him to incriminate himself, and therefore, it violated his rights under both the federal and state constitutions. Because no objection had been made to the probation condition at the dispositional hearing, appellant preemptively addresses the issue of forfeiture in his opening brief. Citing *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889, he contends that, because his challenge can be decided as "a pure question of law," it can be raised for the first time on appeal.

In re Sheena K. involved a probation condition requiring that the juvenile not associate with any person disapproved of by her probation officer. This probation condition was challenged for the first time on appeal as being unconstitutionally vague and overbroad. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 878.) Like this case, no objection had been made in the trial court. (*Id*. at p. 879.) Dealing with the question of whether the failure to object acted as a forfeiture of the challenge, the Supreme Court likened the contention to a "facial challenge" to the condition; one that did not require

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[1] The court denied appellant's motion, made pursuant to Penal Code section 17, subdivision (b), to reduce the charge from a felony to a misdemeanor. That ruling, like the true finding that appellant had committed grand theft, is not challenged on appeal.

[2] No apology letter appears in the record on appeal.

"scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts." (*Id*. at p. 885.) Thus, the high court rejected the Attorney General's argument that the challenge had been forfeited because it facially challenged the condition, thereby presenting the appellate court with a "a pure question of law, easily remediable on appeal by modification of the condition. [Citations.]" (*Id*. at p. 888.) In so holding, however, the opinion noted with caution that not all constitutional challenges to probation conditions involved " 'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.' [Citation.]" (*Id*. at p. 889.)

In this case, appellant essentially argues that requiring him to write a letter of apology to the victim necessarily "entail[s] an admission of guilt." As such, it violated his privilege against self-incrimination guaranteed by the Fifth Amendment of the United States Constitution, and article I, section 15 of the California Constitution. Thus, because appellant asserts "that no set of circumstances exists under which the [condition] would be valid," his challenge to the probation condition is a facial challenge, presenting a question of law we can determine without reference to the particular facts underlying his disposition. (*United States v. Salerno* (1987) 481 U.S. 739, 745; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) For this reason appellant's facial challenge to the probation condition that he write a letter of apology was not forfeited.

B. A Condition of Probation that the Juvenile Write a "Letter of Apology" Does Not Compel Self-Incrimination in Violation of the Fifth Amendment

Appellant's contention rests on the assertion that a "letter of apology necessarily had to express remorse for some wrongful act, thus entailing an admission of guilt." We disagree.

The probation condition did not require that appellant admit guilt for grand theft in his letter to the victim; only that he "apologize" to her. An "apology" is defined as

"1. An acknowledgement expressing regret[3] or asking pardon for a fault or offense . . . . [¶] 2. a. A formal justification or defense. [¶] b. An explanation or excuse . . . ." (The American Heritage Dictionary of the English Language (5th ed. 2011) <http://www.ahdictionary.com/word/search.html?q=apology> [as of Mar. 13, 2013].) While an admission of guilt of a crime *may* be a form of apology, it is not necessarily the only way appellant can express regret for what happened to the victim, or by which he might offer a justification, explanation or excuse for his own complicity in the victim's loss.

As we have noted, appellant's constitutional claim is a facial challenge to the imposition of a probation condition that he write a letter of apology to the victim. A facial challenge will only succeed if there is no set of circumstances under which the challenged practice would be constitutional. (*Salerno, supra,* 481 U.S. at p. 745.) Although the record does not contain an apology letter, we can readily envision a letter fulfilling the probation condition entirely consistent with appellant's testimony that he simply delayed the return of the victim's pendant because of his forgetfulness. Obviously, such a letter would not implicate appellant's right against self-incrimination.

Therefore, even if circumstances could be envisioned where a court-mandated letter of apology would violate a defendant's constitutional right against self-incrimination, the fact that such a violation is not inevitable in every case defeats appellant's facial challenge. In this context, we conclude that the appropriate way to protect against the use of a coerced statement implicating a defendant's constitutional

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[3] The noun "regret" is defined as: "1. A feeling of sorrow, disappointment, distress, or remorse about something that one wishes could be different. [¶] 2. A sense of loss and longing for someone or something gone or passed out of existence . . . ." Its synonyms include regret, sorrow, grief, anguish, woe, and heartbreak. The dictionary source notes that while all of these words denote some level of mental distress, "[r]egret has the broadest range, from mere disappointment to a painful sense of dissatisfaction or self-reproach, as over something lost or done. . . ." (The American Heritage Dictionary of the English Language, *supra*, <http://www.ahdictionary.com/word/search.html?q=regret> [as of Mar. 13, 2013].)

right against self- incrimination is for courts to resolve each defendant's challenge on a case-by-case basis.

C. Requiring A Letter of Apology as a Condition of Probation is Not Analogous to A Denial of Probation Because of A Lack of Remorse

After the close of briefing, on our own motion we asked counsel to file supplemental briefs on the following issue:

"1. 'Lack of remorse' is listed as a factor upon which a trial court may deny probation under California Rules of Court, rule 4.414(b)(7), ' "unless the defendant has denied guilt and the evidence of guilt is conflicting." (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319.' (*People v. Leung* (1992) 5 Cal.App.4th 482, 507, italics omitted.)

"a. Is the challenged probation condition in this appeal analogous to 'lack of remorse' under [rule] 4.414(b)(7)? If so, why; if not, why not?

"b. If analogous, was the evidence supporting a true finding that appellant committed grand theft 'overwhelming,' within the meaning of *People v. Leung* (1992) 5 Cal.App.4th [at page 507], such that there was no true 'conflict' in the evidence?"

Appellant's position in his supplemental brief is that the two are not analogous, but if they are, then, like lack of remorse as a sentencing factor, conditioning probation on a letter of apology is an unconstitutional abridgement of his right not to incriminate himself "where 'the defendant has denied guilt and the evidence is conflicting' [citation]." Respondent's supplemental brief appears to accept the analogy but argues that case authority constrains courts from considering lack of remorse in sentencing only when the defendant remains silent about his or her conduct. Unlike that circumstance, here appellant testified during the jurisdictional hearing and did not remain silent. Furthermore, respondent points out that even if appellant's denial of guilt normally might constrain the court from imposing as a condition of probation that he write a letter of apology to the victim, the evidence of theft was overwhelming. (*People v. Holguin*, *supra*, 213 Cal.App.3d at p. 1319; *People v. Leung*, *supra*, 5 Cal.App.4th at p. 507.)

Our analysis leads us to conclude that the two requirements (apology to the victim and lack of remorse) are not analogous. As we have pointed out, an "apology" can include an expression of regret or simply the offer of an explanation or excuse for one's conduct. However, "remorse" is "[m]oral anguish arising from repentance for past misdeeds; bitter regret." (The American Heritage Dictionary of the English Language, *supra*, <http://www.ahdictionary.com/word/search.html?q=remorse> [as of Mar. 13, 2013].) Unlike an apology, remorse by definition is tantamount to an admission of guilt. Thus, it is understandable that the law prohibits reliance on lack of remorse as a factor in denying probation where the defendant has denied guilt, and the evidence of guilt is conflicting. (*People v. Holguin*, *supra*, 213 Cal.App.3d at p. 1319.) A defendant may not be penalized for failing to confess following a conviction. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1168, overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, fn. 6.) But, unlike an expression of remorse, requiring an apology as a condition of probation does not necessarily compel appellant to admit guilt, and appellant's constitutional rights against self-incrimination were not necessarily infringed upon in this case.

IV.

DISPOSITION

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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HUMES, J.